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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGEY PROSHAK,

Defendant and Appellant.

B287052

(Los Angeles County
Super. Ct. No. A753789)

APPEAL from an order of the Superior Court of Los Angeles County, Scott M. Gordon, Judge. Affirmed.

Alaleh Kamran and James M. Crawford for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

In 1985, appellant Sergey Proshak, then a lawful permanent resident, pleaded guilty to kidnapping (Pen. Code, § 207), and assault with the intent to commit rape (Pen. Code, § 220). Several years later, Proshak pleaded guilty to possessing counterfeit currency, and was then issued an order to show cause charging him as deportable for having committed two crimes of moral turpitude. He was ordered deported in 2002.

In 2017, Proshak filed a motion pursuant to Penal Code section 1437.7 seeking to withdraw his 1985 guilty plea, and vacate his conviction, on the ground that his attorney failed to advise him of the adverse immigration consequences that might result from his plea. The trial court denied the motion. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. Proshak's California Criminal Proceedings

In 1979, appellant Sergey Proshak and his family immigrated to the United States from the Soviet Union. Proshak, who was 17 years old at the time of his arrival, renounced his Soviet Union citizenship, and was granted permanent lawful resident status.

In 1984, the Los Angeles County District Attorney's Office filed two criminal cases against Proshak (Case Nos. A754079 and A753789) charging him with a multitude of offenses, including assault with a firearm (Pen. Code, § 245, subd. (a)¹); forcible oral copulation (§ 288a, subd. (c)); kidnapping (§ 207); forcible rape (§ 261) and assault with the intent to commit rape (§ 220).

¹ Unless otherwise noted, all further statutory citations are to the Penal Code.

In June 1985, the district attorney offered Proshak a plea deal that addressed the charges in both cases. Under the terms of the agreement, Proshak was to plead guilty to one count of kidnapping in Case No. A754079, and one count of assault with the intent to commit rape in Case No. A753789. He was to receive a sentence of eight years and four months in prison, with the execution of the remainder of his sentence suspended, and three years probation.

At Proshak's plea hearing, the trial court summarized the terms of the agreement, and admonished: "You understand you're very fortunate? This is a case which warrants the rest of your life in state penitentiary, but we're going to agree to this procedure because of the problems described in the People's case." The court then advised Proshak of the rights he would be waiving in the event he pleaded guilty, and warned him that his guilty plea could adversely affect his immigration status:

"COURT: You must understand the consequences of your plea. If you are not a citizen, you could be deported, denied reentry, denied naturalization. I understand you're not a citizen; is that correct?

PROSHAK: Yes, sir.

COURT: Do you understand what I have said?

DEFENDANT: Yes.

COURT: It's going to lead possibly to your deportation to the Soviet Union. Do you understand that?

DEFENDANT: Yes.

THE COURT: The consequences of that I'm sure, as far as you're concerned, are extraordinarily serious; is that correct?

DEFENDANT: I understand, sir."

Proshak then confirmed that no other promises had been made to him regarding his plea agreement, and that his plea was being entered “freely” and “voluntarily.”

Proshak informed the court he was not pleading guilty because he was guilty, but rather because he believed it was in his best interest to do so. The court asked Proshak to clarify whether he was pleading guilty “because it will help you avoid the possibility of a lengthy sentence in the state penitentiary, possibly for the rest of your life”; Proshak replied, “That’s right.”

B. Federal Criminal and Immigration Proceedings

In 1990, the United States filed a federal indictment charging Proshak with four counts of possession of counterfeit currency with the intent to defraud (18 U.S.C. § 472), and one count of possession of a fraudulent passport (18 U.S.C. § 1546, subd. (a).) Proshak pleaded guilty to one count of counterfeiting, and possession of a fraudulent passport. As a result of his federal conviction, the state court ordered Proshak to serve the remaining term of imprisonment on the suspended sentence he had received in the 1985 criminal action.

In May 1995, the Immigration and Naturalization Service (INS) issued an order to show cause charging Proshak as deportable for having been convicted of two crimes involving moral turpitude. Proshak conceded deportability, and applied for a discretionary deportation waiver under former section 212(c) of the Immigration and Nationality Act. An immigration judge denied his application, explaining that Proshak’s past criminal record and the seriousness of his crimes weighed against the granting of a waiver.

Proshak appealed the decision to the Board of Immigration Appeals (BIA). The BIA ruled that, under section 440(d) of the

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Proshak had become statutorily ineligible for a section 212(c) waiver because his prior California offenses qualified as aggravated felonies. The BIA, however, remanded the matter to the immigration judge because Proshak had admitted deportability prior to AEDPA's passage. After the BIA issued its ruling, the INS issued an amended order to show cause informing Proshak that, under recent amendments to the immigration law, he was automatically deportable for having been convicted of an aggravated felony.

On remand, the immigration judge concluded that section 440(d) of AEDPA was inapplicable to Proshak because his immigration proceedings were initiated prior to AEDPA's passage. The judge further concluded, however, that Proshak had already had a section 212(c) application for discretionary relief adjudicated against him, and was not entitled to a "second merits hearing." In 2002, Proshak was ordered deported to Ukraine.²

C. Proshak's Motion to Withdraw His 1995 Guilty Plea

1. Summary of the motion and supporting evidence

In March 2017, Proshak filed a motion pursuant to section 1473.7 seeking to withdraw his 1985 guilty plea, and vacate his conviction, based on his "trial counsel[s] fail[ure] to properly advise [him] of the adverse immigration consequences he would face by virtue of the guilty plea." Proshak asserted that his

² Despite the deportation order, Proshak remains in the United States under the supervision of Immigration and Customs Enforcement (ICE), and has been informed that ICE intends to send him to Ukraine as soon as the country stabilizes.

attorney “never advised [his] plea would most definitely result in his deportation or removal from the United States.” Instead, his attorney informed him that “he could avoid being deported and would remain in the United States.” Proshak contended he “relied on and trusted his . . . attorney,” and would have gone to trial if he knew the guilty plea would actually result in deportation.

Proshak provided a declaration in support of his motion asserting that he was innocent of the crimes he had been charged with in 1984 and 1985, and that he had initially rejected multiple plea offers because he wanted to go to trial. Proshak explained that his elderly mother eventually convinced him to plead guilty because she needed his assistance. Proshak stated that his attorney had also recommended that he accept the plea deal because of “how much prison time he was facing if [he] was convicted of the charges. . . .”

Proshak’s declaration further asserted that, prior to his plea hearing, he had “extensive[]” discussions with his attorney about the adverse immigration consequences that might result from a guilty plea. According to Proshak’s declaration, he informed his attorney he did not want to plead guilty if it would affect his immigration status. In response, his attorney advised him that he “might be deported but that there might be a way to avoid that consequence”; the attorney “never advised [him that he] would be deported.” Proshak asserted that if he had been told “the only way to avoid deportation . . . was to go to trial, [he] would have done so.”

Proshak’s declaration also acknowledged that the judge who presided over his 1985 plea hearing warned him that his guilty plea might result in deportation. Proshak asserted,

however, that he had “hardly understood English at the time,” and did not “truly understand what the judge said.”

2. The hearing on Proshak’s section 1473.7 motion

At the motion hearing, Proshak testified that he wanted to go to trial on the charges, but his mother and his attorneys had eventually convinced him to plead guilty. Proshak further testified that, prior to the plea hearing, he did not have any conversations with his attorney about immigration consequences because that issue “was not in [his] mind [*sic*].” Proshak also testified that he never told his attorney he would “prefer going to trial than risk deportation.”

Proshak stated that he did not understand what the judge had said to him at the plea hearing about possible adverse immigration consequences. Proshak further testified that, shortly after the plea hearing, he asked his attorney to clarify the judge’s statements. In response, his attorney “laughingly told [him], ‘nobody’s going to send you back to the Soviet Union.’” Proshak testified that after receiving this advice from his attorney, he “just left it alone,” and “never th[ought] about it again until years later.”³

Proshak admitted that, before filing the section 1473.7 motion, he had never attempted to withdraw his 1985 plea on the basis that his attorney had rendered erroneous immigration advice, and that he never raised the issue during his immigration proceedings.

³ The attorney who represented Proshak during the 1985 criminal proceedings provided a declaration stating that he had no recollection of the case.

3. The trial court's order denying the motion

In November 2017, the trial court issued an order denying Proshak's motion. The court rejected Proshak's claim that he was unable to understand the admonishments the judge had made to him about immigration consequences during the plea hearing. The court explained that the transcript of the plea hearing showed Proshak had "responded in an appropriate manner during the plea," and had never requested the assistance of an interpreter. The court also found Proshak's "testimony that he ignored the judge's admonishments and warnings and that his attorney 'laughingly' dismissed his questions [was] not credible."

The court further concluded that Proshak had failed to establish prejudice, explaining that the "evidence . . . show[ed] that the defendant was most concerned about time in prison and away from his family. There is no credible evidence in this matter to show that he would not have entered this disposition without the information he alleges he did not receive."

DISCUSSION

A. Summary of Applicable Law

Section 1473.7 was enacted in 2016, and became effective January 1, 2017. (Stats. 2016, ch. 739, § 1.) Subdivision (a)(1) of the statute provides in relevant part: "A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence . . . [¶] . . . [that] is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel." The statute requires the court to grant the motion "if the moving party

establishes, by a preponderance of the evidence, the existence of any . . . ground[] for relief specified in subdivision (a).” (§ 1473.7, subd. (e).)

The language in the final clause of subdivision (a)(1) makes clear that a party asserting error based on his or her attorney’s erroneous advisement need not prove the elements of a claim for ineffective assistance of counsel. (See *People v. Camacho* (2019) 32 Cal.App.5th 998, 1008 (*Camacho*) [“The Legislature has clarified that the moving party need not establish ineffective assistance of counsel”].) Rather, the moving party need show only that the attorney’s erroneous advisement was “prejudicial and damaged his ‘ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of [his] plea. . . .” [Citation.]”⁴ (*Ibid.*)

To establish prejudice under section 1473.7, the moving party must establish “there is a reasonable probability he would not have pleaded guilty if properly advised.” (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 81 (*Ogunmowo*); see also *Camacho, supra*, 32 Cal.App.5th at p. 1009; *cf. People v. Martinez* (2013) 57 Cal.4th 555, 562 (*Martinez*) [under § 1016.5, “[t]he test

⁴ The Legislature added the language in the final clause of subdivision (a)(1) in a 2018 amendment. Previously, California courts had “uniformly assumed” section 1473.7 required parties who sought relief based on the erroneous advisement of counsel to satisfy the elements applicable to a claim for ineffective assistance of counsel. (*Camacho, supra*, 32 Cal.App.5th at p. 1005 [summarizing prior case history].) In *Camacho*, the court held that the 2018 amendment applied to the defendant’s motion, which was filed before the amendment went into effect, because the amendment was intended to clarify the original meaning of the statute. (*Id.* at p. 1007.)

for prejudice [regarding a trial court’s failure to advise of possible immigration consequences arising from a guilty plea] considers what the defendant would have done, not whether the defendant’s decision would have led to a more favorable result [in the underlying trial]”).) The factors a court may consider when assessing the credibility of a defendant’s claim that he or she would have rejected the plea agreement include, among others, “the probable outcome of any trial, to the extent that may be discerned, the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant’s criminal record, the defendant’s priorities in plea bargaining [and] the defendant’s aversion to immigration consequences.” (*Martinez, supra*, 57 Cal.4th at p. 568.)

When reviewing an order denying a section 1473.7 motion, “[w]e defer to the trial court’s factual determinations if supported by substantial evidence, but exercise our independent judgment to decide whether the facts demonstrate [prejudicial error].” (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116; see also *People v. Tapia* (2018) 26 Cal.App.5th 942, 950 (*Tapia*); *Ogunmowo, supra*, 23 Cal.App.5th at pp. 75-76.)

***B. Proshak Failed to Establish His Attorney
Committed Prejudicial Error***

Proshak acknowledges that the judge who presided over his 1985 plea hearing warned him that pleading guilty to the charged offenses might result in adverse immigration consequences, including deportation, denial of reentry and denial of naturalization.⁵ Despite this express advisement, Proshak

⁵ In his appeal, Proshak does not challenge the trial court’s finding that he provided insufficient evidence to support his claim

contends his attorney committed two errors that rendered him unable to understand the true consequences of his plea.

First, he asserts his attorney failed to advise him that the offenses he was pleading guilty to qualified as aggravated felonies under federal immigration law that would “result in mandatory deportation.” Second, Proshak alleges that, after the plea hearing, his attorney assured him his guilty plea would not “have any adverse immigration consequences.”

1. Proshak has failed to establish his guilty plea subjected him to mandatory deportation

Proshak argues that his attorney committed prejudicial error by failing to advise him that the crimes he was pleading guilty to—kidnapping and sexual assault with the intent to commit rape—qualified as “aggravated felonies” that would subject him to mandatory, rather than possible, deportation. (See generally *Zhang v. U.S.* (2d Cir. 2007) 506 F.3d 162, 167 [“deportation of aggravated felons is now automatic and non-discretionary”].)

Prior courts have held that an attorney’s failure to advise a defendant that pleading guilty to the charged offense would result in mandatory, rather than merely possible, deportation constitutes error under section 1473.7. (See *Camacho, supra*, 32 Cal.App.5th at p. 1008 [defendant established error under § 1473.7 where attorney advised him his guilty plea “could subject him to deportation,” when in fact the offense qualified as aggravated felony subjecting him to mandatory deportation];

that he did not understand the court’s admonishment because of his limited command of the English language. We therefore presume that he did in fact understand the advisements that were made to him at the time of the plea.

People v. Espinoza (2018) 27 Cal.App.5th 908, 916 [defendant established error where his attorney failed to inform him “deportation would be mandatory” because the underlying offense qualified as “an aggravated felony”].) In those decisions, however, the offense that the defendant pleaded guilty to was an aggravated felony under the federal immigration law at the time of the plea hearing, thus subjecting the defendant to “certain deportation” immediately upon entry of his guilty plea. (*Ibid.*)

Here, however, Proshak entered his guilty plea in 1985, several years before the federal aggravated felony provisions came into existence. The term “aggravated felony” was introduced into federal immigration law through enactment of the Anti-Drug Abuse Act (ADAA) in 1988.⁶ Subsequent federal statutes expanded the list of crimes that qualify as an “aggravated felony,” and added provisions subjecting aggravated felons to mandatory deportation. (See *I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 293-298; *Zhang, supra*, 506 F.3d at p. 167 [“The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . and the Antiterrorism and Effective Death Penalty Act of 1996 . . . altered the landscape of immigration law” by mandating the deportation of aggravated felons].)

Under section 1473.7, Proshak has the burden to prove his attorney improperly advised him of the immigration

⁶ As explained in *Bell v. Reno* (2d Cir. 2000) 218 F.3d 86, “The term ‘aggravated felony’ entered the immigration law lexicon with the enactment of the [Anti-Drug Abuse Act] ADAA on November 18, 1988. ADAA § 7342 created a new provision . . . that defined ‘aggravated felony[,]’ . . . [and] § 7344(a) created an aggravated felony deportation ground.” (*Id.* at p. 88.)

consequences of his guilty plea. Although he claims his attorney should have advised him his guilty plea would result in mandatory deportation, he has not identified any law that was in effect at the time of his guilty plea that rendered his deportation mandatory. Instead, he relies solely on federal aggravated felony provisions that went into effect years after he entered his guilty plea.⁷ He has thus failed to establish error by his attorney.

2. Substantial evidence supports the trial court's findings that Proshak's testimony regarding his attorney's conduct failed to establish prejudicial error

Proshak next asserts that the testimony he provided at the motion hearing shows his attorney improperly advised him that “he would not . . . fac[e] any adverse immigration consequences” as the result of his guilty plea. (See generally *Ogunmowo, supra*, 23 Cal.App.5th at p. 77 [error established under § 1473.7 where counsel “Affirmatively misadvis[ed defendant] . . . he [would] not face immigration consequences as a result of a guilty plea . . . when the law states otherwise”].) Proshak testified that after his 1985 plea hearing had concluded, he asked his attorney to clarify what the court had said about possible immigration consequences. Proshak further testified that in response to this inquiry, his attorney “laughingly” told him that “nobody can ever send you back to [the Soviet Union].” Proshak contends that,

⁷ The exhibits Proshak filed in support of his section 1473.7 motion show that the INS did not initiate deportation proceedings against him because he had been convicted of an aggravated felony, but rather because he was convicted of “two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.” The exhibits also indicate he was ultimately deported on that basis, and not because he was convicted of an aggravated felony.

based on this statement by counsel, he did not believe he would be at risk of deportation, and thus chose to ignore the court's prior admonishments.

In its order denying the section 1473.7 motion, the trial court found Proshak's testimony that he chose to ignore the judge's admonishments based on his attorney's subsequent comment regarding deportation was "not credible." The trial court further found that Proshak failed to establish he was prejudiced by the alleged statement of his counsel. Both findings are supported by substantial evidence. (See *Tapia, supra*, 26 Cal.App.5th at p. 951 [when reviewing an order denying section 1473.7 motion, "[w]e defer to the trial court's factual findings if supported by substantial evidence[,] and "do not reweigh the evidence or reevaluate witness credibility"].)

The evidence Proshak submitted in support of his section 1473.7 motion cast significant doubt on his testimony at the motion hearing. In his sworn declaration, Proshak stated that he spoke to his attorney before the plea hearing about possible immigration consequences, and was advised that "he might be deported but that there might be a way to avoid that consequence." Proshak's declaration did not reference any further discussion with his attorney after the plea hearing, nor did it assert his attorney had assured him he would not be deported. Proshak's testimony at the section 1473.7 hearing directly contradicted this sworn statement, asserting that he did not speak with his attorney about immigration consequences until after the plea hearing, and that his attorney told him he could not be deported.

Proshak's conduct during his immigration proceedings cast further doubt on his claim that his attorney assured him he

would not be deported. Proshak admitted that when the INS initiated deportation proceedings against him in 1995, he never sought to vacate his state court conviction on the basis that his attorney had rendered erroneous advice regarding deportation. Proshak also admitted he did not raise that issue at any point in the immigration proceedings. The trial court could reasonably infer that if Proshak had actually relied on statements from his attorney assuring him that his 1985 guilty plea could not affect his immigration status, he would have raised that issue at some point during the seven-year pendency of his deportation proceedings.

The record also contains substantial evidence supporting the court's conclusion that, even if Proshak's attorney did tell him he would not be deported, there is no probability that this statement had any effect on his decision to plead guilty. Most notably, Proshak testified that his attorney made this statement to him after the plea hearing at which he pleaded guilty. Proshak has provided no explanation how advice that his attorney rendered after he had already pleaded guilty could have caused him to accept the plea deal. Proshak also testified at the hearing that he did not speak to his attorney about immigration consequences prior to the plea hearing because he was not thinking about that issue when deciding whether to plead guilty. Finally, the transcript of the plea hearing shows that the presiding judge warned Proshak of the "extraordinary circumstances" that might result from pleading guilty, including deportation, and that Proshak repeatedly acknowledged he understood those consequences. Considered together, this evidence provides persuasive support for the trial court's conclusion that Proshak's decision to plead guilty was not based

on any assurance his attorney may have made to him about deportation after the plea hearing.

DISPOSITION

The order is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.